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No. ____

In The
Supreme Court of the United States
October Term, 1989

JOHN HASSO, ELISSA N.V., RUMBA, N.V.,
PACIFIC MIDLAND N.V., KONDOLAND CORP. and
GRAPE CAPITAL CORP.,

Petitioners,

v.

CHARLES DUGGAN,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of
The State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court recently granted certiorari in *Pacific Mutual Life Insurance Co. v. Haslip* to address due process standards applicable to punitive damages awards. That case raises, among other questions, whether a jury's unbridled discretion to award punitive damages denies due process, and whether constitutional protections available to criminal defendants apply to the imposition of punitive damages.

This case also raises questions involving the application of the Due Process Clause to an award of punitive damages; however, this case raises several critical due process issues not raised by *Pacific Mutual*: the scope of evidence admissible on the claim for punitive damages, and the proportionality of punitive damages to a defendant's net worth. The question raised here, when juxtaposed with those raised in *Pacific Mutual*, offer the Court the seasonable opportunity to address the full panoply of constitutional issues raised by procedures typically employed in civil punitive damages cases. Accordingly, the questions presented are:

1. Does an award of punitive damages violate the Due Process Clause, when, in a separate damages trial by a jury different from that which determined liability, the defendant is not permitted to introduce any of the mitigating evidence admitted in the first trial on the issue of liability? Stated otherwise, what mitigating evidence consistent with due process standards *must* be admitted in order for a jury to award punitive damages?¹

¹ The trial court stated initially that it could not "artificially paint Mr. Hasso into a corner . . . and allow this case to be retried so that he's got both hands tied behind his back" [RT 853:17-22], but proceeded to do just that.

QUESTIONS PRESENTED – Continued

2. Does an award of punitive damages violate the Due Process Clause, when the jury is permitted to award punitive damages against the defendant for exercising constitutional and statutory rights of appeal (resulting in a partially successful appeal of the judgment of liability and damages) and for taking legal steps to prevent execution on the judgment pending the appeal? Stated otherwise, what evidence does the Due Process Clause *preclude* a jury from hearing when assessing punitive damages?

3. Is an award of punitive damages excessive and disproportionate, in violation of the Due Process Clause, when it bears no reasonable relation to either the actual damages or the defendant's net worth and cannot be cured by available post-trial and appellate review?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioners state that Elissa N.V., Pacific Midland N.V., and Rumba N.V. are Netherlands Antilles corporations. Kondoland Corp. is a Colorado corporation and Grape Capital Corp. is a Nevada corporation. They have no parent companies, non-wholly owned subsidiaries or affiliates.

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PETITION FOR WRIT OF CERTIORARI

John Hasso, Elissa N.V., Pacific Midland N.V., Rumba N.V., Kondoland Corp. and Grape Capital Corp. ("Hasso")² respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District, Division Four in this case.

OPINIONS BELOW

The opinion of the Napa County Superior Court is unreported. [App., *infra*, A1-A8.] The opinion of the California Court of Appeal is also unreported. [App., *infra*, B1-B35.]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

The judgment of the California Court of Appeal was entered on November 30, 1989. A timely petition for rehearing was denied on December 28, 1989 [App., *infra*, C1], and a petition for review in the California Supreme Court was denied on February 14, 1990 [App., *infra*, D1].

² Elissa N.V., Pacific Midland N.V., and Rumba N.V. were sued in the original complaint and were found to be alter egos of John Hasso at the first trial of this matter. Kondoland Corp. and Grape Capital Corp. were determined to be alter egos of John Hasso at the second trial in this matter and were added as judgment debtors on August 30, 1988. John Hasso is thus the only real party in interest.

On March 23, 1990, the Court of Appeal granted Hasso's motion for stay of issuance of remittitur [App., *infra*, E1]. The California Supreme Court subsequently denied respondent's petition for review of the stay order [App., *infra*, F1].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, of the United States Constitution provides in relevant part:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

Petitioner John Hasso, an individual, was assessed with a punitive damage award of \$2 million, an amount which is almost 17% of his net worth³ and which is more than four times the compensatory damage award of \$483,584. The damages were assessed based on a finding of fraud in connection with a real estate investment agreement. The punitive damages were awarded by a

³ The court of appeal found that the evidence supported a net worth of \$12 million. Mr. Hasso in fact disputed the evidence of net worth and the court's placing on him the burden of proof as to net worth. [App., *infra*, B31-35.]

different jury than the one that decided liability, and were awarded in a separate damages trial that took place six years after the liability trial.

In the damages trial the jury's only information regarding the circumstances of the fraud for which punitive damages would be assessed was a stripped down and one-sided version of the statement of facts from the prior opinion of the Court of Appeal. The version of that statement read to the jury was devoid of any of the mitigating evidence, acknowledged by the court of appeal, which tended to cast Mr. Hasso in a sympathetic light or excuse his conduct. Hasso was not permitted to introduce evidence demonstrating that he had not acted reprehensibly and, indeed, evidence that he had at times acted generously towards the plaintiff was excluded as well.⁴

The jury was, in addition, permitted to punish Hasso for legal action he took in furtherance of his rights of appeal after the first trial, an appeal which succeeded in part. He was not apprised that he was to be tried and

⁴ Under California law, the jury is required to consider three factors in determining an amount of punitive damages: (1) the amount of actual harm to the plaintiff; (2) the reprehensibility of defendant's conduct; and (3) the net worth of the defendant. *Neal v. Farmers Insurance Exchange*, 21 Cal.3d 910, 928, 148 Cal.Rptr. 389, 399 (1978). Most states require the jury assessing punitive damages to consider these three factors. Owen, *Problems In Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 9 (1982). California, like other states which employ these criteria, does not provide any further explanation of these factors to guide the jury's discretion.

punished for conduct taken to protect his right to appeal. Nonetheless, both the trial and appellate courts justified the excessive punitive damages award in part based on Hasso's efforts to stay execution of the judgment pending the ultimately successful appeal of the first trial.

A. The Real Estate Investment Agreement.

Hasso is an Iraqi-born businessman who emigrated to Napa County in the early 1970's. There he met respondent Charles Duggan, an attorney, and they eventually entered into an oral agreement by which Duggan would locate investment properties, negotiate their purchase and maintain and develop the properties, while Hasso would provide the funds for these efforts. Hasso was to receive 85%, and Duggan 15%, of the partnership profits.

The parties agreed to draft a formal partnership agreement. A Memorandum of Understanding was drafted by George Humphreys, an attorney who, although he had formed a law partnership with Duggan, told Hasso that he was representing Hasso's interests in connection with the agreement. Duggan later presented Hasso with a more complete partnership agreement drafted by Humphreys. Hasso, though, declined to sign it because the terms varied radically from the Memorandum and from his understanding of the arrangement. Hasso then terminated the relationship with Duggan.

Duggan filed suit for compensatory and punitive damages on December 21, 1978. He alleged claims for fraud, for dissolution and accounting of the partnership, and for quantum meruit. Hasso counterclaimed for fraud.

B. The Liability Trial.

The action was tried in March 1982. Duggan contended that Hasso had promised Duggan a percentage of the profits without any intent to perform. Hasso claimed that Duggan fraudulently induced him to enter the agreement.

The jury found for Duggan on his fraud claim and against Hasso on his cross-claim. They awarded Duggan \$541,359 in compensatory damages and \$1,101,549.75 in punitive damages. At the end of the first trial, the court stated that it believed the evidence of fraud was "thin."⁵ On the motion for new trial, the court stated it did not agree with the jury's verdict; it determined, however, that there was sufficient evidence to support the jury's verdict.

C. The First Appeal.

Hasso timely filed a notice of appeal. The California Court of Appeal, First Appellate District, Division Four, entered its decision on September 29, 1986. The court upheld the jury's verdict as to liability, but found that the compensatory damages had been calculated incorrectly. It therefore reversed both the compensatory and punitive

⁵ The trial court ruled on the equitable claims that no partnership had been formed, in part because the parties had never agreed on crucial terms of the agreement, and in part because the Memorandum of Understanding had been tainted by Humphreys' conflict of interest. It nonetheless awarded Duggan \$156,435 as quantum meruit. Duggan opted to have judgment entered on the jury's verdict.

damages awards with directions to retry the case as to damages only.

Justice Poche dissented from the ruling, finding "scant" evidence of fraud by Hasso and significant evidence of less than trustworthy conduct by Duggan.⁶ Thus, both the trial judge and at least one court of appeal justice reviewing the record found barely enough evidence to warrant the fraud verdict against Hasso and found substantial evidence of improper conduct on Duggan's part in mitigation of the finding of fraud.

D. The Efforts to Stay Execution on the Judgment.

Hasso took steps after the first trial to stay execution of the judgment pending the appeal. These steps included motions in the trial court and court of appeal for orders staying execution of the judgment pending the appeal, and an offer to deposit the deeds to the jointly acquired properties into court in lieu of a bond. Hasso also filed a petition in bankruptcy, which was later dismissed.

In February 1983, Hasso's mother-in-law deposited \$2.5 million in cash into court in lieu of bond, which stayed execution of the judgment pending appeal. After the court of appeal reversed the award of compensatory

⁶ Hasso argued unsuccessfully that Duggan's fraud claim was barred by California Business & Professions Code section 10136 because Duggan acted as a real estate broker without a license. Justice Poche in dissent noted:

... there is scant evidence that Hasso was familiar with licensing law, sought out Duggan or had any ... intention [to defraud him]. [CT 433-34.]

and punitive damages, a motion was made by Hasso's mother-in-law to the trial court to release the cash deposit. The trial court denied the motion.

E. The Damages Trial.

At the outset of the damages trial, the court ruled that it would present a statement of facts to the jury, taken from the court of appeal opinion, which described briefly the factual findings of the first trial court and court of appeal and explained the current posture of the case. That statement, however, was stripped of any facts which the trial court and court of appeal had found in Hasso's favor and which tended to mitigate or excuse Hasso's conduct in the transaction.⁷

Plaintiff argued throughout the damages trial that Hasso should not be allowed to present *any* evidence concerning the circumstances of the fraud to the jury that was to decide how much punishment Hasso deserved. Plaintiff argued that Hasso could not even suggest that in spite of the finding of fraud he was otherwise a good man. [RT 106:12-16.] The court ultimately ruled that Hasso could not even testify to his remorse. [RT 1728a 6:7-1728a 7:10.] While acknowledging that Hasso

⁷ Hasso argued that he should be allowed to introduce mitigating evidence: (1) of the role of Humphreys in the parties' attempt to formalize the partnership agreement; (2) that Duggan supplied the terms of the draft agreement; (3) that Hasso had loaned Duggan more than \$50,000, interest-free, during the course of their relationship; and (4) that Duggan had helped set up the offshore corporations in which title to the properties was held.

was entitled to defend himself against the punitive damage award,⁸ the court ultimately did tie Hasso's hands by ruling that Hasso would not be allowed to introduce *any* evidence relating to the fraud itself, even mitigating facts which the trial court and court of appeal had found to be true. [RT 979:2-16.]

The court at the same time stated that the trial would focus only on conduct occurring *after* the first trial – Hasso's efforts to post a bond and stay execution of the judgment pending appeal – even though it was conduct distinct from and irrelevant to the conduct upon which the first jury based its finding of fraud. [RT 989:1-4.] Consequently, the jury heard evidence and argument concerning the length of the litigation, the posting of cash to stay execution of the judgment, the appeal, and the motion to release the cash deposit after the court of appeal reversed the damages awards.

The jury was instructed to consider the three factors set out in *Neal v. Farmers Insurance Exchange* (see *supra*, note 3), in determining an award of punitive damages. [RT 2236a 53:3-11.] As to the element of net worth, however, the jury was instructed that the burden of proof was on Hasso to show that he could not pay a given amount

⁸ The court stated at the beginning of the trial:

. . . you've got a finding of fraud, a finding of liability. That's true. *But I don't think I can artificially paint Mr. Hasso into a corner in this case and allow this case to be retried so that he's got both hands tied behind his back. He's sort of got one hand tied behind his back because of the fraud finding.* [RT 853:17-22 (emphasis added).]

of punitive damages.⁹ The jury then returned a punitive damage verdict against Hasso of \$3 million.

F. The Motion for New Trial.

Hasso timely moved for new trial or alternatively for remittitur of the punitive damages award. Hasso argued that the court "violated fundamental due process" in refusing to allow Hasso to introduce evidence of the underlying events and circumstances relating to the fraud. [CT 1109:8-14.]

At oral argument and in a supplemental letter-brief, Hasso argued that the admission of evidence regarding Hasso's post-trial litigation conduct denied him his fundamental right to defend himself. [CT 1339-1354.]

Hasso also argued in his motion for new trial that the punitive damages award was in all events excessive as a matter of law. [CT 1118-1128.] The trial court rejected Hasso's arguments with respect to the scope of the evidence but agreed to grant a new trial unless plaintiff accepted a remittitur of the punitive damages to \$2 million. Plaintiff accepted the remittitur.

⁹ The prevailing authority at the time of trial required that the burden of proof on the issue of net worth be placed on defendant. Hasso did not object at the time because it would have been futile. While the second appeal was pending the court of appeal issued an opinion in another case holding that plaintiff bore the burden of proof on net worth. The court of appeal, though, rejected Hasso's futility argument and held Hasso waived the objection. The court went on to say that the error was harmless anyway even though the issue of Hasso's net worth had been hotly contested.

G. The Second Appeal.

Hasso timely filed a notice of appeal, arguing that the trial court's rulings that barred Hasso from introducing evidence on the issue of reprehensibility "effectively deprived defendant of a fair trial on punitive damages." [AOB 41.] Similarly, Hasso stated that admitting the evidence of litigation conduct "violated settled law protecting a litigant's right to defend himself . . . " [AOB 45], citing cases based on "considerations of fundamental fairness and the right to a vigorous defense." [AOB 47.] Hasso further argued that the award was excessive in light of his net worth.

The court of appeal affirmed. It found no error in the exclusion of evidence on the issue of reprehensibility and agreed with the trial court that Hasso could be assessed millions of dollars in punitive damages for uncharged conduct in connection with his attempt to defend himself in the litigation [App., *infra*, B30-31]. The court also rejected Hasso's claim that the punitive damages were excessive in light of the reprehensibility of the conduct, or in light of his net worth.

Hasso petitioned the court of appeal for a rehearing, contending that the trial court's (1) refusal to allow him to introduce evidence on the issue of reprehensibility and (2) admission of evidence of post-trial litigation conduct, violated Hasso's rights under the Due Process Clause. The court of appeal denied the petition without comment. [App., *infra*, C1.]

H. The Petition For Review In The California Supreme Court.

Hasso filed a petition for review in the California Supreme Court, contending that the trial court violated

his rights to a fundamentally fair procedure under the Due Process Clause of the Fourteenth Amendment by: a) refusing to allow him to defend himself on the issue of the reprehensibility of his conduct; and b) insisting he be punished for uncharged post-trial litigation conduct. The Supreme Court denied review.

I. The Due Process Issues Were Raised Below.

The failure to cite explicitly to the Due Process Clause at trial or in the opening appellate brief does not bar this Court's review because the issues were otherwise adequately presented. *See Taylor v. Illinois*, 484 U.S. 400, 407 n.9, 108 S.Ct. 646, 651 n.9 (1988); *Douglas v. Alabama*, 380 U.S. 415, 420-22, 85 S.Ct. 1074, 1078 (1965). The due process issues in this case were sufficiently raised at the trial level and on appeal, and the factual record is complete. The trial court acknowledged that Hasso's objections to the exclusion of evidence on the issue of reprehensibility were grounded in his due process right to defend himself. [RT 853:17-22.] Hasso argued in his motion for new trial and in Appellants' Opening Brief that the exclusion of mitigating evidence "violated fundamental due process," and that the admission of evidence on post-trial litigation conduct "deprived defendant of a fair trial." He further argued in the motion for new trial and on appeal that the punitive damages were excessive and arbitrary given the fundamentally unfair exclusion of mitigating evidence and in the admission of evidence of litigation conduct.

REASONS FOR GRANTING THIS PETITION

This Court's grant of certiorari in *Pacific Mutual Life Insurance Co. v. Haslip*, 553 So.2d 537 (Ala. 1989), cert. granted, 110 S.Ct. 1780 (April 2, 1990), is its most recent acknowledgment that arbitrary punitive damages awards raise substantial due process questions. This case presents and fleshes out other specific due process issues so that the Court (if it grants this petition) can now define *pari passu* appropriate due process guidelines for the plethora of civil cases raising punitive damage issues.

In *Pacific Mutual*, the jury awarded \$2,500 in compensatory damages but more than \$1 million in punitive damages against Pacific Mutual for the fraudulent conduct of its agent. Its petition raises questions regarding whether an award of punitive damages that far exceeds actual damages denies due process, and whether an award of punitive damages based on *respondeat superior* liability is a denial of due process. In addition, Pacific Mutual's petition raises a more general attack on the jury's essentially uncircumscribed discretion to award punitive damages.

This case (while not involving the *respondeat superior* issue) presents equally important questions of admissibility and inadmissibility of evidence to accord a defendant due process rights to notice and a meaningful opportunity to defend. Because this case focuses on the scope of evidence which, consistent with due process, is admissible on the issue of reprehensibility, the Court has a significant opportunity to define specific guidelines on the relationship between a defendant's wrongful conduct and an award of punitive damages.

Moreover, the instant case raises the identical due process issue presented in *Pacific Mutual* respecting punitive damages which are disproportionate to actual damages, and further raises the issue of punitive damages which are disproportionate to the net worth of the defendant. Though juries are typically asked to consider, in addition to reprehensibility, both the actual harm to the plaintiff and defendant's net worth, no other objective guidelines are given to guide the jury in assessing only an amount necessary to punish and deter. This all too frequently results in arbitrary punitive damage awards which are grossly in excess of actual damages (as in both *Pacific Mutual* and this case) and which take a disproportionate share of defendant's net worth (as in the instant case).

I. THE AWARD OF PUNITIVE DAMAGES IN THIS CASE WAS ARBITRARY, IN VIOLATION OF JOHN HASSO'S DUE PROCESS RIGHT TO A MEANINGFUL OPPORTUNITY TO DEFEND, BECAUSE HE WAS PROHIBITED FROM PRESENTING ANY EVIDENCE IN MITIGATION OF HIS CONDUCT.

A. Due Process Requires Fair Procedures Which Will Prevent The Arbitrary Award Of Punitive Damages In Excess Of An Amount Necessary To Punish And Deter.

Prior to *Pacific Mutual*, at least five members of this Court had expressed concern that excessive and arbitrary punitive damages awards may violate due process standards. Most recently in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct.

2909 (1989), Justice Brennan in a concurring opinion joined by Justice Marshall, stated:

I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties. See *ante*, at 2920.

Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are "grossly excessive," [citation omitted] or "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable" [citations omitted]. I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits.

Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision.

___ U.S. at ___, 109 S.Ct. at 2923 (Brennan, J., concurring).

Justice O'Connor, in a separate opinion in *Browning-Ferris* joined by Justice Stevens, shared Justice Brennan's concerns regarding the due process issues. Justice O'Connor, moreover, was joined by Justice Scalia in a concurring opinion in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645 (1988), which states:

Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.

486 U.S. at 87, 108 S.Ct. at 1655 (O'Connor, J., concurring in part and concurring in the judgment).¹⁰

Decisions of this Court recognize that due process standards applicable to determining both how and how much punitive damages will be awarded must be consistent with Constitutional constraints on the imposition of criminal penalties. Several Supreme Court cases establish a test for determining when nominally civil cases are essentially penal in nature. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554 (1963). Most recently, in *United States v. Halper*, ___ U.S. ___, 109 S.Ct. 1892 (1989), the Court considered "whether and under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause." ___ U.S. at ___, 109 S.Ct. at 1901. The Court concluded:

In making this assessment, the labels "criminal" and "civil" are not of paramount importance. . . . *Simply put, a civil as well as a criminal*

¹⁰ See also *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-829, 106 S.Ct. 1580, 1589 (1986) (lack of standards governing punitive damages awards raises important Due Process Clause issues which must be resolved).

sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

___ U.S. at ___, 109 S.Ct. at 1901-02 (emphasis added). See also *Trop v. Dulles*, 356 U.S. 86, 96, 78 S.Ct. 590, 595 (1958); *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 551, 63 S.Ct. 379, 388 (1943).

"Punitive damages are awarded not to compensate for injury but, rather, 'to punish reprehensible conduct and to deter its future occurrence.' *Gertz v. Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 3012 (1974)." *Bankers Life*, 486 U.S. at 87, 108 S.Ct. at 1655 (O'Connor, J., concurring in part and concurring in the judgment). Supreme Court precedent suggests, therefore, that because punitive damages are penal in nature, certain Fourth, Fifth, Sixth and Eighth Amendment protections should apply directly in the appropriate case and should at least heighten the scrutiny given to punitive damages procedures under the Due Process Clause.

Several criminal law decisions, for example, establish the rule that a punishment cannot be so excessive as to be disproportionate to the severity of the offense. *Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 3009 (1983); *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925 (1976). In *Solem*, the Court set out several objective criteria to consider in weighing whether a particular punishment is disproportionate to the offense for purposes of the Cruel and Unusual Punishment Clause of the Eighth Amendment. 463 U.S. at 292, 103 S.Ct. at 3011. Regardless of

whether it applies directly,¹¹ the proportionality analysis under the Eighth Amendment should apply through the Due Process Clause to civil remedies which are penal in nature.

Punitive damages, like criminal penalties, are meant to punish and deter. Due process requires that fair procedures be employed in assessing punitive damages to prevent awards that are arbitrary in light of the purpose for punitive damages. Because punitive damages and criminal penalties serve the same purpose, this Court should look to analyses and definitions of criminal law protections in undertaking the due process analysis of punitive damages procedures.

B. The Due Process Right To Present A Meaningful Defense Requires That A Defendant Facing A Claim For Punitive Damages Be Allowed To Present Evidence In Mitigation Of His Conduct.

The due process right to be heard requires a "meaningful" hearing. *Bell v. Burson*, 402 U.S. 535, 541, 91 S.Ct. 1586, 1591 (1971). A "hearing which excludes consideration of an element essential to the decision . . . does not meet this standard." 402 U.S. at 542, 91 S.Ct. at 1591.

¹¹ While the Excessive Fines Clause of the Eighth Amendment does not apply to civil actions between private parties, *Browning-Ferris Industries v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909 (1989), the Court has left open the question whether the Cruel and Unusual Punishment Clause applies to actions between private parties. *Browning-Ferris*, ___ U.S. at ___, 109 S.Ct. at 2914 n.3.

The central element in determining how much civil punishment is necessary and appropriate in California, as in most states, is the degree of "reprehensibility" of the defendant's conduct. This includes, but extends beyond, the precise conduct which supports the finding of liability. In California, as elsewhere, the jury is admonished to consider the "reprehensibility" of defendant's conduct "in light of the whole record." See *Neal*, 21 Cal.3d at 928, 148 Cal.Rptr. at 399. This is premised on the common sense observation that "clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal." *Id.*

The trial court in this case inexplicably stated that "Fraud is fraud" [RT 979:13] and barred evidence of the circumstances surrounding the fraud. Notwithstanding the earlier observation by the same trial judge that the evidence of fraud was "thin" and Justice Poche's comment that there was "scant" evidence of an intent to defraud by Hasso, the trial court prevented the jury from considering the evidence necessary for it to make an informed rational judgment about the character of Hasso's conduct, evidence which should have been central to the jury's decision.¹²

¹² The trial court stated that *res judicata* barred the evidence. *Res judicata* is irrelevant, however, because the evidence was not offered to undermine the finding of liability. A jury considering that evidence could properly be instructed that it is insufficient to overcome a preponderance of the evidence in favor of plaintiff, but consider it relevant as to whether or how much to punish defendant for the liability. A recent case

(Continued on following page)

All frauds are not equal. The parties' reasons for entering the relationship out of which the fraud arose, the defendant's motives, the contributing conduct of the plaintiff, plaintiff's unclean hands, and the impact on the plaintiff, make liabilities unique. A statement of facts, bereft of all mitigating evidence, cannot fairly present a jury with the facts relevant to the defendant's defense.¹³

The award of punitive damages in this case violated Hasso's due process rights because Hasso was not allowed to defend himself. As a result, the award of \$2 million was arbitrary because it bore no relation to the legitimate evidence of reprehensibility which Hasso was entitled to have the jury consider.

(Continued from previous page)

recognizes this principle. In *Hunter v. Spaulding*, 388 S.E.2d 630 (N.C.App. 1990), defendant was defaulted at trial for discovery abuse. Without hearing further evidence, the jury awarded \$1.1 million in punitive damages on top of a \$10,000 compensatory damages award. On appeal, the court held that the refusal to allow defendant to present mitigating evidence on the issue of punitive damages violated due process. Cf. *People v. Terry*, 61 Cal.2d 137, 145-47, 37 Cal.Rptr. 605, 611 (1964) (construing scope of evidence admissible under Penal Code section 190.1 in second penalty trial before jury which did not determine guilt, defendant entitled to present evidence regarding circumstances of crime in mitigation of penalty and to argue his innocence).

¹³ Compare Fed. R. Crim. P. 25(b), which allows a judge who did not sit at trial to sentence a defendant *unless the judge cannot become adequately familiar with the facts of the case*. Although this statute has been held not to deny due process *per se*, see, e.g., *U.S. v. Whitfield*, 874 F.2d 591, 593 (8th Cir. 1989), courts have taken pains to note that the judge is required to, and in those cases did, take steps to learn the case, including reviewing the trial transcript, reading the presentencing report, and discussing the case with the trial judge.

The trial court's denial of Hasso's due process rights in this case stems ultimately from the absence of standards given to guide the discretion of the jury asked to punish a civil defendant for the "reprehensibility" of his conduct. California, like most other states, provides no articulable meaning to the critical element of "reprehensibility." In this case, the second jury was totally unfamiliar with the evidence in the liability trial and had to rely almost entirely on uninformed judgments about the nature of the underlying tort, and about the plaintiff and the defendant, in deciding to what degree the conduct was "reprehensible."¹⁴ The court, too, without any stated definitions of reprehensibility, cannot consistently articulate and apply appropriate standards of relevancy.

The jury must be given greater guidance in assessing the appropriateness of an award of punitive damages in light of defendant's conduct. A defendant must be allowed to introduce, and the jury must be specifically instructed in accordance with, appropriate mitigating evidence in order to preserve the defendant's due process rights to defend against potentially ruinous awards.

¹⁴ In contrast, criminal statutes incorporate legislative determinations on the "reprehensibility" of particular crimes within the range of sentences prescribed. The statutory sentences presumably are the result of careful study and consideration of the broader community consensus on the social harm caused by particular conduct. The civil jury has no such statutory guides and cannot itself make more than an off-the-cuff assessment of the particular conduct at issue, isolated from the broader context of other similar liabilities and punishments.

II. THE AWARD OF PUNITIVE DAMAGES IN THIS CASE VIOLATED JOHN HASSO'S DUE PROCESS RIGHTS TO HAVE NOTICE OF THE CONDUCT FOR WHICH HE WAS BEING PUNISHED AND TO PRESENT A DEFENSE BECAUSE THE JURY WAS ALLOWED TO ASSESS PUNITIVE DAMAGES AGAINST HIM FOR TAKING A PARTIALLY SUCCESSFUL APPEAL OF THE JUDGMENT OF LIABILITY AND FOR STAYING EXECUTION OF THE JUDGMENT PENDING THE APPEAL.

Due process requires, at minimum, notice and an opportunity to defend. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994 (1972) (" 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified' "); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950).

Due process rights established in the criminal context are especially apposite here. This Court has long held that the due process right to notice and a hearing means that a person may not be convicted on charges not made or tried. *Jackson v. Virginia*, 443 U.S. 307, 314, 99 S.Ct. 2781, 2786 (1979). Conversely, due process provides an accused with the right to specific notice of the charges for which punishment is sought and a right to a hearing on the specific charges noticed. *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517 (1948).

Permitting a defendant to be punished for defending an action prevents a defendant from putting on a meaningful defense. This Court and others have recognized in both the civil and criminal context that punishing efforts to defend against a claim or charge subverts the due

process right to present a meaningful defense. *See, e.g., North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969) (prohibiting heavier sentence for successfully appealing conviction); *People v. Coleman*, 71 Cal.2d 1159, 1168-69, 80 Cal.Rptr. 920, 926 (1969) (in penalty phase of capital case, prosecutor may not argue that defendant's continued protestations of innocence demonstrates lack of remorse); *Palmer v. Ted Stevens Honda, Inc.*, 193 Cal.App.3d 530, 238 Cal.Rptr. 363 (1987) (in bad faith lawsuit, jury may not consider litigation tactics in ruling on liability and awarding punitive damages).

That the trial is for the sole purpose of awarding punitive damages, and punitive damages have traditionally been awarded in the virtually unfettered discretion of the jury, does not mean that a defendant has given up rights to a fundamentally fair procedure. On the contrary, because punitive damages are penal in nature and carry a substantial stigma not unlike a criminal conviction, due process standards ought to be even more carefully observed than in the usual civil case.

Because punitive damages were the central issue in the second trial, due process went out the window. While in a liability trial the claim is clearly defined, the evidence carefully circumscribed and the jury instructed as to the precise elements of the claim, no guidelines exist as to punitive damages with which similarly to define the proper scope of evidence and jury decision-making. Hasso was punished severely for conduct undertaken as part of his defense of the case which he could not know prior to the damage trial would be the basis for a multi-million dollar award. He was denied the opportunity to test the

charges that he committed wrongful conduct in connection with post-trial litigation. He was denied the opportunity to have the jury instructed as to the elements of whatever offenses he was alleged to have committed in connection with the post-trial litigation conduct and to insist that the jury make findings as to liability for that conduct before punishing him for it. Cf. *Presnell v. Georgia*, 439 U.S. 14, 15-16, 99 S.Ct. 235, 236 (1978) (punishment could not stand based on finding by Georgia Supreme Court that sufficient evidence existed when the jury had not made the findings necessary to support the punishment).

Absent legal standards defining the relationship between reprehensibility and punitive damages, a substantial risk exists in every case that the defendant will be punished for innocent conduct unrelated to the claim for which punitive damages are sought and justified. A defendant will be penalized for conduct with which he was not charged, as to which little or no discovery or pretrial motions designed to narrow the legitimate issues took place, and as to which the jury was not instructed to and did not find liability.¹⁵ Under these circumstances, therefore, the jury cannot rationally make a legally valid judgment that the conduct merited a specific amount of punishment, or any punishment at all.

¹⁵ The problem is not confined to a separate damages trial following an appeal. In any case a defendant risks punishment for discovery tactics or settlement postures, or other conduct unrelated to the allegations of the complaint, if no check is placed on the scope of evidence and the jury's discretion.

III. THE PUNITIVE DAMAGES AWARD IS GROSSLY DISPROPORTIONATE TO HASO'S NET WORTH, IN VIOLATION OF HASO'S DUE PROCESS RIGHTS, BECAUSE THE JURY WAS GIVEN NO GUIDANCE AS TO WHAT AMOUNT WAS NECESSARY TO PUNISH AND DETER.¹⁶

A. Due Process Requires That The Jury Be Given Objective Guidelines In Calculating An Award Of Punitive Damages In Relation To Net Worth To Avoid The Imposition Of Arbitrarily Excessive Punishment.

Most states direct juries to consider a defendant's net worth in awarding punitive damages so that an award will sufficiently "hurt," punish and deter the defendant. A procedure for awarding punitive damages which does not take into account a defendant's net worth risks either punishing too severely or punishing not enough. Similarly, a procedure which permits a jury to consider a defendant's net worth but which does not impose any other guidelines or limitations on the jury's discretion risks an imposition of punitive damages which is arbitrary with respect to the purpose for punitive damages: to punish and deter. There is no rational basis for permitting awards of punitive damages which are far in excess of what is reasonably necessary to "make the point" with a particular defendant. The jury therefore must be guided by objective criteria when considering a defendant's net

¹⁶ Hasso also contends that the award of punitive damages in an amount which is more than four times the actual damages also violates his due process rights. Hasso respectfully requests that the Court consider this question in connection with the identical question raised in *Pacific Mutual*.

worth in order to avoid arbitrary awards which deny a defendant due process.

B. The Criteria For Granting Remittitur And For Appellate Review Are Too Vague And Deferential To The Jury To Cure The Lack Of Due Process.

The trial court's discretion in reviewing a jury's award of punitive damages is as broad and as unfocused as the jury's. In California, the trial court in ruling on a motion for new trial on the ground of excessive damages has the discretion to determine what is "fair and reasonable" in light of its own review of the record. *West v. Johnson & Johnson Products, Inc.*, 174 Cal.App.3d 831, 876, 220 Cal.Rptr. 437, 465 (1985). The law provides no other guidance. The meaning of "reprehensibility," and of the appropriate relationship between punitive damages and net worth or actual damages, provide no greater direction to the court than they do to the jury.

Moreover, appellate review of a punitive damage award accords extraordinary deference to the jury's decision. A reviewing court will disturb an award only if, in light of the record as a whole, it appears to be the product of "passion or prejudice." *Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910, 927-28, 148 Cal.Rptr. 389, 399 (1978). *See also App., infra*, B27-28. This standard of review defers so much to the jury's discretion that it cannot reasonably be said to afford a consistent and rational basis for curing arbitrary awards by the jury.

No decision-maker contemplating a business or personal decision which might place him or her at risk of

liability could rationally assess the possible consequences of the conduct. Petitioner submits that the inherent uncertainty in the penal consequences of particular conduct, an uncertainty compounded by the absence of careful review, fails to meet due process standards. See *United States v. Batchelder*, 442 U.S. 114, 123, 99 S.Ct. 2198, 2204 (1979).

IV. CONCLUSION

In conjunction with *Pacific Mutual*, this Court is uniquely positioned to consider comprehensively under the Due Process Clause the procedures and jury guidelines employed in punitive damages cases. This case in particular provides the Court with an opportunity to define the due process limits on the mitigating evidence which a jury *must* be allowed to consider and on the extraneous evidence which a jury *must not* be allowed to consider. The due process limits on admissible evidence should be decided in conjunction with defining appropriate guidelines for the jury's discretion.

Respectfully submitted,

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John Hasso, et al.*

MARY E. McCUTCHEON
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Of Counsel

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE COUNTY OF NAPA

CHARLES A. DUGGAN,)	
)	
Plaintiff,)	COURT NO.
)	39855
vs.)	
JOHN HASSO, et al.,)	FILED
)	JUN 13 1988
Defendant.)	

NOTICE OF DECISION ON MOTION FOR
NEW TRIAL OR REMITTITUR OF PUNITIVE DAMAGES

Defendant seeks a new trial on three grounds. They will be addressed in the same order in which argued. Defendant's first ground is that the court erred in excluding evidence of the facts underlying this action. It is still the belief of the court that no error was committed in this respect for the following reasons. Defendant proposed a statement of facts which the court largely adopted in an effort to avoid "retrying" the liability phase of the case. It is the court's recollection that it accepted most of defendant's proposed statement of facts, sometimes over plaintiff's objections and that both parties concurred in this general procedure. The court has no recollection of any evidence of "mitigation" offered by defendant other than matters that had previously been submitted to the jury on the liability phase and rejected in the jury's finding of liability. Also there were matters that were addressed by the court in its statement of decision which were relevant only to the equitable issues submitted to the court in the first trial and were apparently not

considered to be relevant by the jury in its determination of liability in the first trial. It was the court's belief at the time that these rulings were made that by barring both parties from relitigating the liability phase of the case they were placed on an equal footing regarding the facts giving rise to the liability determination. It was the belief of the court that this procedure might actually work more to plaintiff's detriment than to defendant because it denied plaintiff the opportunity to present and argue the underlying fraud except from the bare record presented by the statement of facts given by the court. The so called "torrent of blows" which plaintiff rained on defendant throughout the trial were the result of defendant's conduct since the first verdict in attempting to "shelter" (and conceal?) his assets and his often deceitful testimony in explaining his post-trial conduct. For the foregoing reasons, the court rejects this ground asserted by defendant for a new trial.

The second basis for defendant's motion for new trial, is that the court erred in excluding evidence of "defendant's unqualified pretrial offer to pay plaintiff a substantial portion of his profits". The court believes that it enunciated its reasons for rejecting this offer sufficiently at the time it ruled, but an attempt will be made to repeat them. This court, at first, believed the offer to be a "stroke of genius" on the part of defendant's trial counsel. But on reflection, it became clear that the offer was a classic example of "too little, too late" and that it was illusory. It had been brought to the court's attention that the 2.5 million dollar cash deposit posted in lieu of an appeal bond was the subject of inquiry and claims for

back taxes from the California Franchise Tax Board addressed to the Napa County Clerk. There was then, and continues to be, a concern arising out of the fact that apparently the recipient of the income from this 2 -1/2 million dollar deposit has not been paying California Income Taxes on that income. Although the facts are not yet fully known, there is a concern on the part of counsel for plaintiff and Napa County Counsel that no taxes have been paid to the Internal Revenue Service either. The ownership of those funds has been disputed for the last several years, the defendant's ex mother-in-law (the mother of his now divorced spouse) contends that the money is hers and that she is a non-resident alien, not required to pay income taxes. The defendant has testified during this trial that the money is his, having been advanced by his cousin, Allen Hasso, in a loan transaction secured [sic] by one of the properties which was the subject of the transactions between plaintiff and defendant. Furthermore, defendant has testified that he ultimately granted a deed in lieu of foreclosure to his cousin, Allen Hasso, thereby satisfying the indebtedness and that therefore the entire 2-1/2 million dollars belongs to him, and perhaps a portion to his ex-spouse if it is found to be community property. In view of this dispute, it appeared to the court that defendant's eve of trial tender of a portion of those funds created enormous legal, practical and evidentiary problems were it to be presented to the jury. Plaintiff would be put in the position of explaining his reluctance to accept it. County Counsel representing the Napa County Clerk would be obligated to take a position on whether the County Clerk could authorize the release of the funds, and the resulting confusion of

issues and expenditure of time involved in explaining the entire matter far outweighed the probative value. The court did indicate to defendant that if he wished to make a cash tender on account of compensatory damages, that it would allow evidence of that. Defendant apparently chose not to make any such tender (not even of a lesser sum) and accordingly no evidence on this issue was presented to the jury. The court notes that defendant was able to transfer property with a value in excess of 1 million dollars to his new spouse as "dowry". Had the defendant chosen to borrow on that property or to offer to transfer a portion to plaintiff in an effort to mitigate the damage, the court would have allowed evidence of that to be presented and so indicated by its rulings at the time. Accordingly, the court feels that it committed no error in this respect and denies defendant's motion for a new trial upon that ground.

The third ground asserted by defendant is that the award of punitive damages is excessive as a matter of law. This is the most difficult aspect of defendant's motion. This court has now presided over two trials between these parties and has reached many conclusions many of which have been expressed on the record at one time or another. At various times during the first trial in an effort to encourage the parties to settle, this court opined that the evidence of fraud was thin. As has been indicated by the court earlier, these comments were made prior to completion of the case and argument of counsel. The issue of fraud was of course tried to the jury and the jury concluded in the first trial that a fraud had been committed. This court refused to set aside that finding on the ground that there was substantial evidence before the

trier of fact upon which such a finding could be based. The Court of Appeal agreed. This court did indicate in its notice of decision following the first trial that there were some mitigating circumstances including the duel [sic] role played by attorney Humphries in his preparation of the original memorandum of understanding. While this court still believes that to be a mitigating factor to a small degree, the fraud finding by the jury implied a finding, by which this court is bound, that the defendant had no intention of carrying through with his promise to share profits with the plaintiff and thereby perpetrated a fraud upon plaintiff. The first jury believed that that fraud warranted an award of punitive damages in the amount of approximately \$1,100,000. This jury on retrial has now increased the award to \$3,000,000.

The evidence before this jury upon which it presumably relied in reaching such a result is that the defendant has compounded his original fraud by weaving a web of deceit regarding his assets in which he became entangled during the second trial. To put it bluntly, the defendant has no credibility and, in this court's opinion, has committed perjury during these proceedings. Apparently a United States bankruptcy judge made a similar determination during defendant's attempt to find relief in the bankruptcy court following the first trial. The defendant gives the impression of a man who will say anything if it benefits him whether under oath or not and whether true or not. He gave this impression during the first trial and has reinforced it during the second trial. It is obvious that two juries, by a unanimous vote each time, have reacted to defendant similarly. The question then turns to the

issue of how is that conduct in the original fraud appropriately punished. Defendant argues that the current award amounts to "capital punishment" and will be "utterly, totally, and irrevocably ruinous to defendant". Frankly, it is hard to tell whether there is any truth to these assertions or not. The defendant has lied so many times about his assets that it is truly impossible to know the full measure of his wealth. Plaintiff argued that he could have wealth based on the evidence presented exceeding \$20 million. Defendant contends that he is nearly impoverished except for a million here or a half million there. Obviously, if defendant is believed, the \$3 million dollar punitive damage verdict would be outrageous and properly characterized as devastating. On the other hand, if the defendant has managed to accumulate the level of wealth ascribed to him by plaintiff, he is an enormously wealthy man, to whom a \$3 million dollar punitive damage award would be damaging, but not ruinous. Quite frankly, the difficulty is in knowing where the truth lies and in all probability it is somewhere in between. Based on the evidence, this court is not able to say that the jury's implied finding of defendant's wealth was not supported by substantial evidence. Frankly, for defendant to suggest in his new trial motion that the punitive damage award should be reduced to \$75,000 is ludicrous, but represents and is typical of the unrealistic attitude which defendant appears to have taken toward this dispute with plaintiff and the ensuing litigation. The court is mindful of the guidance provided by the Court of Appeal in *Sealy vs. Seymour* cited by defendant in which the court states that it is not aware of a six or seven figure punitive damage award against a private individual. This court is

also aware of the possibility that the large punitive damages awarded by both juries against this defendant may have been the product of an antipathy toward the defendant rather than simply, "the gravity of his wrongful conduct", although when the wrongful conduct is compounded by the type of deceit demonstrated by the defendant during this most recent trial, the deceit seems to become part of the original fraud and equally punishable by a punitive damage award.

This court has concluded that it will grant a new trial on the issue of punitive damages unless plaintiff agrees to remit all but \$2 million dollars of that award (exclusive of the \$483,584 compensatory damage award (to which defendant agreed in argument). In other words, the total award would be \$2,483,584. The court's reasoning in arriving at this sum is that; (1) the court believes that defendant's wealth is greater than he acknowledged at trial. It is probably less than \$20 million dollars, but certainly considerably greater than he acknowledges. The first jury had evidence before it from which it could have been reasonably inferred that his wealth at that time was in excess of \$10 million dollars. (2) The defendant has posted a cash deposit in lieu of an appeal bond in the amount of \$2.5 million dollars and testified numerous times during the trial that he viewed this deposit as being there to "protect plaintiff". A remission to \$2,483,584 can be satisfied from the cash deposit and allows defendant to apply the deposit to satisfy the judgment and to go on about his business as to his other assets without further liability to plaintiff. (3) The award while high and perhaps higher than has been recognized by any previous

California reported case against an individual, is warranted considering the totality of the facts and circumstances in this case including the original fraud, and the defendant's compounding conduct during the last several years, all of which have been an affront to the court system and this community's sense of fair business practices.

Therefore, pursuant to CCP 662.5, the court in the exercise of its independent judgment determines a punitive damage award of \$2 million dollars together with the compensatory damage award agreed to by the parties and ordered by the jury to be fair and reasonable. If the reduction in damages is not acceptable to plaintiff, then defendant shall have a new trial upon the issue of punitive damages. If the reduction is acceptable to plaintiff, then defendant's motion for a new trial is denied in all respects. Plaintiff shall have 15 days within which to make his election and file his consent or rejection to the reduction.

Dated: June 13, 1988

/s/ Philip A. Champlin
Philip A. Champlin
Judge of the Superior Court

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA FIRST APPELLATE DISTRICT
DIVISION FOUR

CHARLES A. DUGGAN,)	
Plaintiff and Respondent,)	A042843
v.)	Super. Ct. No.
JOHN HASSO et al.,)	39856
Defendants and Appellants.)	(Napa County)
<hr/>		/

A jury awarded Charles Duggan (plaintiff) \$483,584 in compensatory damages and \$3 million in punitive damages on his claim against John Hasso (Hasso) et al. (collectively defendant)¹ for fraud in connection with a series of real estate transactions, compounded by what the trial court described as Hasso's attempts to shelter or conceal assets and deceitful testimony concerning his net worth. Defendant moved for a new trial on punitive damages, and the trial court ruled that it would grant the motion unless plaintiff agreed to reduction of the punitive damage award to \$2 million. Plaintiff agreed to the reduction, but reserved his right to appeal from the new trial order if defendant appealed from the reduced judgment.

Defendant appeals, arguing that the \$2 million punitive damage award must be reversed because it resulted

¹ The other defendants on the fraud claim are corporate alter egos of Hasso.

from erroneous evidentiary rulings and is excessive as a matter of law. Plaintiff cross-appeals, arguing that the original \$3 million award was improperly reduced because the notice of motion for new trial was defective and inadequate reasons were stated for the ruling on the motion. We affirm.

I. BACKGROUND

A. The Underlying Dispute, First Trial and First Appeal

These appeals arise from the second trial in this case. The following facts are derived from this court's opinion on the appeal from the first judgment.

In 1977 plaintiff and Hasso orally agreed that plaintiff would locate, evaluate and negotiate the purchase and sale of real estate, and Hasso would provide funds to purchase and develop the properties. They discussed working together in a partnership in which Hasso would receive an 85 percent interest and plaintiff a 15 percent interest in the partnership's capital and profits. Hasso loaned plaintiff money for living expenses while the latter took a leave of absence from a teaching position and proceeded to negotiate the acquisition of a number of properties. Title to the properties was taken in the name of Hasso family members or offshore corporations controlled by the Hasso family. Eight properties were eventually acquired for an aggregate purchase price of approximately \$1.65 million.

The only written agreement between the parties was a brief memorandum of understanding regarding their "oral partnership," which reflected their respective 85

and 15 percent interests in partnership profits. Hasso orally agreed to put plaintiff's name "in title for 15 percent on the property," but he declined to execute a more detailed joint venture agreement and eventually advised plaintiff that he was terminating their relationship.

Plaintiff sued inter alia for quantum meruit, fraud and for dissolution and accounting of an alleged partnership, and defendant countersued. Plaintiff's equitable claims were tried to the court, which found that no partnership existed but awarded plaintiff \$156,435 for quantum meruit. The jury found in favor of plaintiff on the fraud claim, awarding \$541,359 general and \$1,101,549.75 punitive damages, and rejecting defendant's counterclaim. Judgment was entered on the fraud verdict and defendant appealed.

We concluded that plaintiff was entitled to recover damages for fraud, but reversed and remanded for a retrial of the damages issues because evidence supporting the award of compensatory damages had not been limited to profits from sales of the properties. In view of errors affecting the calculation of compensatory damages, we ruled that a redetermination of punitive damages was also required. Our prior opinion notes that plaintiff presented evidence in the first trial from which the jury could infer that Hasso's net worth was in excess of \$10 million.

B. The Second Jury Verdict and Subsequent New Trial Ruling

The parties stipulated before the retrial that all of the properties had been sold, and the remaining disputes

about compensatory damages were eliminated when defendant changed his position during the course of the retrial and abandoned claims to certain deductions from net profits. Punitive damages thus became the principal focus of the second trial, and most of the testimony and argument was directed to the issue of defendant's net worth.

The trial took approximately 12 days over several weeks. In closing argument, defense counsel suggested that the jury consider an award of punitive damages of "around \$50,000." Plaintiff's counsel asked for \$2.5 million. It took the jury less than four hours to return its \$3 million verdict.

The notice of decision on the new trial motion includes the following comments: "Defendant contends that he is nearly impoverished except for a million here or a half million there To put it bluntly, the defendant has no credibility and, in this court's opinion, has committed perjury during these proceedings. The defendant gives the impression of a man who will say anything if it benefits him whether under oath or not and whether true or not. He gave this impression during the first trial and his reinforced it during the second trial. It is obvious that two juries, by a unanimous vote each time, have reacted to defendant similarly. . . . [¶] The [reduced] award while high and perhaps higher than has been recognized by any previous California reported case against an individual, is warranted considering the totality of the facts and circumstances in this case including the original fraud, and the defendant's compounding conduct during the last several years, all of which have

been an affront to the court system and this community's sense of fair business practices."

C. Lack of Credibility on the Issue of Net Worth

Hasso attempted to convince the second jury that his net worth had declined substantially since the first trial, but the attempt backfired. In the words of the trial court, it must have appeared to the jury that defendant had "compounded his original fraud by weaving a web of deceit regarding his assets in which he became entangled during the second trial. . . . The defendant has lied so many items about his assets that it is truly impossible to know the full measure of his wealth." We will outline this aspect of the record at the outset to place the jury's verdict, the new trial ruling and the present appeals in a proper perspective. The balance of the record will be addressed in the discussion below, insofar as it is pertinent to the parties' contentions.

At a deposition two months before trial, Hasso testified that aside from assets in Iran and assets claimed by Hebe Hasso, from whom he was divorced between the first and second trials, his net worth was approximately \$50,000. At trial, Hasso explained this figure as follows: "I have \$50,000 in the bank, yes. It's now reduced to \$6,000." Hasso's daughter, Susie Pratt, took the stand for the defense and a portion of her testimony reads as follows: "Q. What's the change in lifestyle, if any, that you have observed if (sic) your father over the last say four years? [¶] A. Well, I can give an example of the cars he drives. [¶] Q. What's the example? [¶] A. I mean he

drives cars that barely run. He hardly has money, you know, for a car."

But the defense was forced to backpeddle in the face of testimony suggesting that Hasso's wealth exceeded \$10 million dollars, including profits of more than \$2 million from the properties acquired through the original fraud. In opening argument, defense counsel stated that Hasso "controlled" only \$200,000. In closing argument, defense counsel maintained that the evidence disclosed a net worth of only \$2.5 million. At the hearing on the motion for new trial, counsel argued that the evidence did not support a finding of net worth in excess of \$4.3 million.

Backpeddling was also required in connection with the \$1 million "dowry" Hasso transferred to his new wife, Ruth Hasso. In opening argument, defense counsel said it was "questionable" whether properties included in the dowry should be considered part of Hasso's net worth because he no longer controlled them. Ruth Hasso, a widow with four young children, was later permitted to testify over plaintiff's objection. She stated that she would "consider" Hasso's request about how the dowry would be spent, but she would not automatically do what Hasso told her, and she would definitely sell the property in the event of a family emergency. At the hearing on the new trial motion, the court remarked that the purported transfer of property to Ruth Hasso appeared "transparently deceitful." Defendant may have come to the same conclusion because, in closing argument, his counsel conceded that his net worth included the dowry.

Hasso described his financial affairs in terms of losses, foreclosures, attorneys' fees and living expenses.

Aside from property left in Iran after Hasso moved to the United States, most of the losses were allegedly sustained as the result of a property settlement agreement with Hebe Hasso. The property settlement was evidently still in dispute, and the evidence indicated that Hasso's divorce was less than amicable. But even here there were grounds for suspicion. Hasso's testimony suggested that Hebe received the valuable liquid assets, while he was left with assets of questionable value. Although Hasso said he had a community property interest in the \$2.5 million deposited to stay execution of the first judgment, he could not account for his half of the five years' interest on that amount. The court later commented, outside the presence of the jury, that "it's a lot of money. And I just find it very difficult to accept that anybody claiming to own that amount of money is totally ignorant of where the interest on it is really going."

The \$2.5 million was evidently deposited by Augusta Maidani, Hebe Hasso's mother. Hasso testified, however, that he had actually borrowed the money from his cousin, Alan Hasso. Interest on the deposit was payable to Maidani, but Hasso thought that it was being collected by Hebe Hasso pursuant to a power of attorney from her mother. It appears that defendant later transferred certain of the parcels acquired with plaintiff's help to a corporation controlled by Alan Hasso to pay off the loan. In his pretrial deposition, Hasso testified that the loan was paid in full by virtue of these transfers. But he testified at trial that Alan Hasso would in fact hold him personally liable for any unpaid balance of the loan remaining after the properties were sold. Hasso also testified that Alan Hasso had advised him, on the eve of trial, that Alan felt he had

a "moral obligation" to reconvey the properties if Hasso could repay the loan by other means.

Neither Hebe Hasso, Alan Hasso nor Augusta Maidani testified at the trial. Maidani, however, had evidently journeyed from her home in Lebanon to make a pretrial motion to withdraw the deposit on the basis that it was her money. All of this led the court, at another recess in the proceedings, to make the following observations:

"The whole thing is, it seems to me a - strongly suggest a familiar - well, for lack of a better word, conspiracy. . . . [¶] The thing - the things that I'm relying on to make that remark are the contention that was made to me last year that the two and a half million dollars belonged to Mrs. Maidani. [¶] The suggestion that - that no continuance should be granted Mr. Jacobson to respond to her motion because she had made a special trip here from Lebanon to be present when the motion was heard, and presumably take the money, if her motion was granted. [¶] And now my discovery is that, in fact, the money is not hers and never has been hers. She was simply a conduit. . . .

"Plus the fact that apparently the - there was an issue now pending as to whether anyone has been paying income taxes on the interest. We don't know, really to whom the money has been going. . . . [¶] Plus this other factor that I've alluded to where it appears that Mr. Hasso, while under the threat of this case, transferred most of his assets and value to his former spouse, keeping only assets without value. . . . [¶] Plus this new disclosure that what was an unconditional conveyance of

the Watts Property of Alan Hasso is not, in fact unconditional. And there is some sort of an unwritten, perhaps even unarticulated, moral commitment felt by Alan Hasso to reconvey the property to Hebe Hasso and possibly even John Hasso in exchange, I guess, for repayment of the moneys that he loaned. [¶] All of which indicates to me that this is a very close family who circled the wagons apparently when under attack . . .

"I'm particularly annoyed by Mrs. Maidani's representations through counsel that that two and a half million dollars was hers . . . [¶] That money, had I succumbed to her assertions and released it to her, I'm certain would be long gone by now. It would be back in Lebanon. And there would be absolutely no security. . . . [¶] I think Ms. Maidani came very close to perpetrating what was amounted to a fraud in this court. [¶] And I think by implication, John Hasso must have been a party to that because he stood by and allowed her to come into court through counsel and to represent to me that she was the owner of that money, when his testimony in this proceeding has clearly indicated he was the owner of it."

The jury was apprised of Maidani's motion to release the deposit. They were made aware of contradictions between Hasso's deposition and his trial testimony about repayment of the \$2.5 million loan and other financial matters. They were also informed of Hasso's bankruptcy petition following the first judgment, the fact that the petition was dismissed, and the finding of the bankruptcy court that Hasso made "various misstatements of fact" in his declaration under penalty of perjury to the trial court and this court to stay execution of the first judgment. The declaration evidently overstated Hasso's equity in one of

the properties acquired with plaintiff's assistance by failing to disclose a \$1,000,500 encumbrance in favor of Hebe Hasso. Hasso testified that he did not refer to this deed of trust because he thought it "was just a formality, and not a necessity, because I was with her as community, joint community holder of all our assets, even though she had demanded that I give her a deed of trust, which I did, but I didn't think it has a value." Hasso had stated earlier, with respect to the declaration, "It would appear that I made misstatements, yes. I am a human being, and I possibly might have misled intentionally or unintentionally, but if the court will allow, at its convenience, that I can explain these facts, and if I am declared a liar I will accept the court's ruling with pleasure."

II. PLAINTIFF'S APPEAL

We will first address plaintiff's contentions that the punitive damage verdict was improperly reduced as a result of the motion for new trial.

A. Notice of Motion for New Trial

Plaintiff contends that the court lacked jurisdiction to entertain the motion for new trial because defendant did not serve Hebe Hasso with notice of the motion. (See Code Civ. Proc. § 659 [requiring service of notice of motion for new trial on "each adverse party"]; and *Johnston v. City of San Fernando* (1939) 35 Cal.App.2d 244, 246 [service on adverse parties a jurisdictional requirement].) The sole purpose of the second trial was to determine the

damages owed on account of the fraud claim. Since plaintiff dismissed Hebe Hasso on the fraud claim during the course of the first trial, she was not a party to the second trial and was never provided with notice thereof. The trial court noted at one point that Hebe Hasso was not a party to the retrial, and plaintiff's counsel acknowledged that the retrial would not "result in any kind of money judgment that names Hebe Hasso." In these circumstances, Hebe Hasso was not an "adverse party" within the meaning of Code of Civil Procedure section 659 for purposes of defendant's new trial motion.

Plaintiff notes that Hebe Hasso was interested in the outcome of the second trial to the extent that her community property would be liable to satisfy the judgment, and he relies on authorities suggesting that an adverse party is one who may be "affected by" the ruling on the motion. (See, e.g., 8 Witkin, Cal. Procedure (3d ed. 1985) Attack on Judgment in Trial Court, § 52, p. 452). That logic is too broad, however, because it would require service on everyone with any stake in the moving party's finances whether or not they were parties to the action. Hebe Hasso was a party to the initial action insofar as it sought to impose a constructive trust on her assets, and the court reserved jurisdiction after the first trial to make orders incident to that cause of action. But we fail to see how any constructive trust would extend beyond profits belonging to plaintiff and profits were not at issue in the motion, which sought a new trial only with respect to punitive damages.

Plaintiff also speculates that Hebe Hasso may have wanted to appear in support of a \$3 million punitive damage award that could be levied against her property.

But we agree with defendant that, whatever their differences on other matters, the interests of John and Hebe Hasso were aligned on the motion for new trial. Even if Hebe were a "party" to the second trial, she could not be fairly viewed as an "adverse" party with respect to the new trial motion. (See *United States v. Crooks* (1897) 116 Cal. 43, 45 [adverse party is one "whose interest may be injuriously affected by a reversal or modification of the judgment"]; and *Spruce v. Wellman* (1950) 98 Cal.App.2d 158, 160 [adverse party is one "who will be adversely affected by the granting of the motion"].)

We find no error in connection with the notice of motion for new trial.

B. Statement of Reasons for Reduction of Verdict

Plaintiff argues that the conditional order granting the new trial motion must be reversed because the reasons given for the order were inadequate under Code of Civil Procedure section 657. This statute provides in pertinent part that: "When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated. [¶] A new trial shall not be granted . . . upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision. [¶] . . . [o]n appeal from an order granting a new trial . . . upon the ground of excessive or inadequate damages, it shall be conclusively

presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons."

A statement of reasons is required to insure that the ruling is the product of careful deliberation and to provide a basis for meaningful appellate review. (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 363.) "To avoid overtaking our already burdened trial courts, it will be sufficient if the judge who grants a new trial furnishes a concise but clear statement of the reasons why he finds one or more of the grounds of the motion to be applicable to the case before him. No hard and fast rule can be laid down as to the content of such a specification, and it will necessarily vary according to the facts and circumstances of each case." (*Id.* at p. 370.)

The circumstances of this case are somewhat unusual. Although the court determined that the punitive damage verdict was excessive as a matter of law, it was more concerned about justifying the reduced figure and so most of its reasoning supports substantial punitive damages rather than their reduction. Careful deliberation is in any event apparent from the statement of decision, and the statement provides a sufficient basis for appellate review.

The court noted that, while it was "truly impossible to know the full measure of [defendant's] wealth . . . [i]t is probably less than \$20 million." The record supports this conclusion because there was no proof that defendant's net worth exceeded \$20 million apart from assets

in Iran and assets of Hebe Hasso in Lebanon. The court also noted that since the reduced award could be satisfied from the cash on deposit to stay execution, defendant could absorb the liability and "go on about his business as to his other assets without further liability to plaintiff." It is apparent from this reasoning that the court reduced the verdict because it felt that a \$3 million award would represent a disproportionate share of defendant's net worth (see *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 469), and it did not want to ruin defendant (cf. *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 [punitive damages may not exceed "the level necessary to properly punish and deter"])).

We conclude that the court adequately explained its reduction of the punitive damage verdict.

III. DEFENDANT'S APPEAL

Turning to defendant's appeal, we will first address the evidentiary points and then the contention that the \$2 million award is excessive as a matter of law.

A. Exclusion of Evidence of Parties' Initial Relationship

The first argument is that the court improperly excluded evidence of circumstances surrounding the original fraud. Defendant asserts that the punitive damage award was improper because the jury could not assess the original fraud "in context" without evidence of the parties' initial relationship.

When a reviewing court finds error in connection with assessment of punitive damages, it may inter alia

remand for a new trial on all issues or on the issue of damages alone. (See *Cunningham v. Simpson* (1969) 1 Cal.3d 301, 310.) In this case, rather than remand for a retrial of defendant's fraud, we held that a new trial was required with respect to damages only. Accordingly, under the doctrine of *res judicata*, the judgment that defendant committed fraud became final and binding on the parties. (Code Civ. Proc., § 1908, subd. (a).)

There was considerable argument prior to the retrial about the extent to which evidence surrounding the original fraud could be reintroduced. Defense counsel cited *Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928, for the proposition that punitive damages depend upon the reprehensibility of a defendant's acts "in light of the whole record," and argued that he should be allowed to present any evidence of the parties' initial relationship that would tend to put defendant in a more favorable light. Plaintiff argued that such evidence should be excluded because the issue of fraud had already been determined.

Both sides submitted proposed statements of fact to be submitted by way of background to the jury. Defendant proposed a statement derived from our prior opinion, and plaintiff countered with what may be characterized as a more argumentative version. The court adopted defendant's version with a few modifications. Our description of the original equitable claims and their resolution was deleted, along with language to the effect that an attorney "supposedly representing" Hasso's interest prepared the memorandum of understanding. Language was added to indicate that Duggan had repaid Hasso's loan for living expenses.

The court ruled that evidence of the original relationship would be limited to this statement of facts, telling the jury: "essentially what I have determined is that we're not going to retry the facts that led up to the first jury's determination that there was a fraud committed. . . . I'm not going to let evidence come in by either side as to all of the details and circumstances that essentially took us almost six weeks to present. [¶] This is a case that's limited to damages. And the facts insofar as they are relevant to the damage computation are going to be as set forth in this statement of facts." The court noted during a recess that circumstances surrounding the original fraud could be "terribly confusing to the jury. It would be confusing enough to me to tell them on the one hand there is a fraud determination, then to present them with a whole lot of evidence on - generally from which it will be argued, well, it was just a little fraud. It wasn't a big fraud. It was a mistake. It wasn't a fraud at all." The court also pointed out that its ruling afforded "equal treatment" to both sides, and would also hamper plaintiff inasmuch as the first jury was sufficiently "impressed" by evidence surrounding the original fraud to award punitive damages of over \$1 million.

Defendant contends that the ruling was prejudicial because it led to exclusion of: (1) evidence of the details of Hasso's loan to plaintiff; (2) evidence of plaintiff's participation in setting up the off-shore corporations that took title to certain of the properties; (3) evidence that plaintiff supplied the terms of the memorandum of understanding; and (4) evidence that an attorney associated with plaintiff advised Hasso that he need "do nothing" to terminate his relationship with plaintiff.

None of this had any bearing on Hasso's false promise to share his profits with plaintiff, and our overall assessment is that the probative value of this evidence, if any, on the issue of Hasso's reprehensibility would have been slight by comparison to its potential for confusion and undue consumption of time. Accordingly, we find no abuse of discretion associated with its exclusion under Evidence Code section 352.

We will briefly address each item. Defense counsel stated in opening argument that an attorney told Hasso he need do nothing to terminate his relationship with plaintiff. Plaintiff objected and the jury was excused. Defense counsel explained the statement by reading from a memorandum the attorney prepared regarding his conversation with Hasso. The memorandum contradicted the argument. In it the attorney wrote, "I suggested to John that he sit down with Charles and make sure that there were no misunderstanding and that he confirm that in writing to Charles." Since the evidence would not have supported the proposed line of argument, we need not reach the court's reasons for preventing it under Evidence Code section 352.

Defense counsel asked plaintiff on cross-examination whether he supplied the memorandum of understanding, plaintiff answered "yes," and plaintiff's counsel objected. The objection was not sustained. The court ruled that it would permit inquiry about the memorandum insofar as it related to calculation of profits. The jury thus learned that plaintiff set the terms of the memorandum.

The argument with respect to the offshore corporations is that while the court rejected an offer of proof that plaintiff participated in their creation, it later permitted defendant to be cross-examined about the corporations, and the questioning was "laden with innuendo of supposed trickiness." There was no objection to the cross-examination to which defendant refers. It was clear, both from the cross-examination and the original statement of facts, that offshore corporations were used on the advice of counsel. Accordingly, it does not appear to us that defendant was "tarred" by evidence of the use of tax havens.

Hasso's loan to plaintiff was described in the statement of facts, the description was contested and both sides eventually agreed to the language. We do not believe that the jury would have formed a different impression of Hasso if it had learned that the loan was interest free and exceeded plaintiff's salary as a teacher.

Returning to defendant's underlying point, we are aware of no authority indicating that all evidence pertaining to liability, no matter how marginal and no matter what its potential for confusion and consumption of time, must be admitted when punitive damages are retried after liability has been determined. Cases referring to reprehensibility in light of the "entire record" do not so hold, and so such assertion appears in *Medo v. Superior Court* (1988) 205 Cal.App.3d 64, or *Zhadan v. Downtown L. A. Motors* (1976) 66 Cal.App.3d 481, the other cases upon which defendant relies.²

² In *Medo*, we interpreted 1987 amendments to Civil Code section 3295, subdivision (d), to require that the issue of

The court did not err in limiting evidence of the original fraud to the statement of facts established in the first trial.

B. Evidence of Defendant's Conduct During the Course of the Lawsuit

Defendant next contends that he was in effect punished for exercising his legal rights because evidence was admitted and argument was allowed about actions taken in defense of the lawsuit. Defendant's principal concern is with efforts to stay execution of the first judgment, which he asserts "became the focus of much of the re-trial." Our initial response based on our review of the

(Continued from previous page)

punitive damages be tried to the same jury that determined the defendant's liability. We observed that "[i]n order for a jury to evaluate the oppression, fraud or malice in the conduct giving rise to liability in the case, it must consider the conduct giving rise to liability." (*Medo v. Superior Court, supra*, at p. 68.) The 1978 amendments to Civil Code section 3295, subdivision (d) do not apply in this case because the initial trial was commenced before January 1, 1988. (Civ. Code, § 3295, subd. (f).) *Medo* does not in any event hold that Evidence Code section 352 is abrogated in retrials of punitive damages.

The *Zhadan* court found that excessive punitive damages had been awarded and decided to remand for a new trial on all issues because there was "virtually no evidence relating to the matter of liability which would not also be pertinent to the issue of damages." (*Zhadan v. Downtown L.A. Motors, supra*, 66 Cal.App.3d at p. 502.) The court also acknowledged, however, that it could have ordered a new trial on damages alone, and it had no occasion to consider the application of Evidence Code section 352 in that context.

record is that conduct of the litigation was not the "focus" of the retrial. The second trial focused primarily on defendant's net worth and his unsuccessful attempts to show that it had dwindled. Matters pertaining to defense of the lawsuit as such represent only a very minor portion of the record.

Defendant characterizes the retrial as a "textbook violation" of reasoning in *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530. The *Palmer* court remanded for a new trial on punitive damages because it determined that evidence of the plaintiff's actual damages had been erroneously excluded, and evidence of the plaintiff's attorneys' fees and the defendant's litigation tactics had been erroneously admitted. The plaintiff had been allowed to testify, over objection, that he prevailed on 15 pretrial law and motion matters, 3 with sanctions, and incurred attorneys' fees of \$56,000 in the process. The court stated that penalties for bad faith discovery positions were a matter for the law and motion judge, and that admission of evidence of discovery battles failed " 'to consider or accord any weight to the right of a defendant to defendant itself.' [Citation.]" (*Id.* at p. 540.) The court also observed that the plaintiff's attorneys' fees were "completely irrelevant" to the defendant's state of mind. (*Ibid.*) With this reasoning in mind, we will proceed to the evidence to which defendant objects.

Defendants maintains that the statement of facts improperly referred to his unsuccessful cross-complaint against plaintiff in the initial action, and contends that the reference in effect allowed plaintiff to recover for malicious prosecution. After noting that plaintiff prevailed on his fraud claim in the first trial, the statement

indicates that "[t]he jury also found against John Hasso on his counterclaim of fraud against Charles Duggan." This language is derived from our prior opinion, which defense counsel submitted as the suggested statement of facts. The trial court followed defense counsel's initial suggestion, and included the statement to dispel any implication of wrongdoing by plaintiff in connection with the original transactions. The court noted that such an impression, contrary to the first verdict, could have been created by other portions of the statement of facts indicating that plaintiff had been associated with the attorney who advised Hasso about the memorandum of understanding. A brief reference to the cross-complaint was properly included on that basis, and its appearance in the statement of facts was not tantamount to a charge of malicious prosecution.

Another argument is that evidence of the objection to Hebe Hasso's deposition was improperly admitted. When plaintiff sought to notice Hebe Hasso's deposition, defendant's trial counsel objected inter alia on the basis that she was in Lebanon. Plaintiff sought to introduce the objection to show that he was not responsible for Hebe's failure to testify, and to show that Hasso, through counsel, and not Hebe, had objected. Defendant characterizes the objection as an "ordinary" and "innocuous" pleading. But defendant's trial counsel was not the attorney of record for Hebe Hasso, and the court ruled, in light of the evidence of collusion among Hasso family members, that an action by Hasso's counsel on Hebe's behalf amounted to an admission against interest. The court made its observations about the Hasso family "conspiracy" in connection with its ruling on the objection to Hebe Hasso's

deposition, and we are unable to conclude that the ruling was erroneous in view of all of the circumstances the court identified at that time.

The next assertion is that plaintiff's counsel repeatedly and improperly referred to the length of the litigation as evidence of reprehensibility. The court permitted plaintiff's counsel, in closing argument, to contend that defendant had in effect perpetrated "11 years of fraud." Defense counsel did not object to this line of argument. We note also that plaintiff had conceded in opening argument that defendant had an "absolute right" to appeal from the first judgment, and "every right" to make the deposit to stay its execution. But the references to "11 years" in closing argument cannot in any event be fairly described as a form of improper comment on defendant's successful appeal. To quote again from the new trial ruling, the argument was based on evidence of "defendant's conduct since the first verdict in attempting to 'shelter' (and conceal?) his assets and his often deceitful testimony in explaining his post-trial conduct." The scope of permissible argument is a matter for the trial court's discretion (see generally 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 168, pp. 165-166 and authorities cited), and we find no abuse of discretion on this point.

Defendant's most strenuous objections are leveled at the testimony and argument involving defendant's unsuccessful motion to stay execution of the first judgment, the \$2.5 million eventually deposited to stay execution and the motion to release those funds. Defendant argues that all of this evidence and commentary was improper, and that since the jury was apprised that a motion to withdraw the funds had been made, defendant should

have been allowed to show that it was made on the advice of counsel.

Although defendant has highlighted them, it appears that only three questions are asked with respect to the initial motion to stay execution, and they revealed only that the motion was made and denied. Those background facts were relevant because Hasso's "misstatements" under penalty of perjury were made in connection with this motion and, as indicated below, the bankruptcy court's finding with respect to the declarations was properly admitted.

It does not appear that the jury learned anything about the subsequent motion to withdraw the \$2.5 million deposit except that it was made by Augusta Maidani and that it was unsuccessful. This limited evidence was appropriate to rebut the favorable inference Hasso had attempted to create by earlier testimony, repeated on at least three occasions, to the effect that the deposit had been made to "protect" plaintiff.

Hasso's professed concern for plaintiff was not credible in light of the circumstances outlined by the court when it remarked that Maidani's motion to release the funds, and Hasso's tacit participation in the motion, approached a fraud on the court. But the court rejected defendant's subsequent attempt to explain the motion in terms of advice of counsel because it was concerned about the prejudicial effect of evidence of the circumstances surrounding the motion. In view of the court's earlier comments, it is apparent that such evidence would have prejudiced defendant, not plaintiff, and hence that defendant was not disadvantaged by the ruling.

Turning finally to the deposit itself, it is true that the \$2.5 million became a focus for much of the testimony, but the testimony was relevant to matters having nothing to do with defendant's right to stay execution. Hasso was examined about his efforts to raise this sum because those efforts involved properties that were the subject of the underlying dispute, and his testimony about the intra-family arrangements differed in a number of respects from the account he provided in his deposition. The deposit was relevant to the issue of net worth because Hasso claimed that the funds were community property. Interest on the deposit was also relevant, both to net worth and to Hasso's credibility, because it represented a substantial sum and Hasso could not account for it.

Accordingly, this is not a case like *Palmer v. Ted Stevens Honda, Inc.*, *supra*, where litigation tactics were admitted into evidence even though they were wholly extraneous to matters properly before the jury. Most all of the evidence and argument to which defendant refers came in without objection, not because any objection would have been futile as defendant now claims, but because the argument was within the scope of the evidence, and the evidence was relevant to net worth or credibility or both. We find no error in connection with any of those matters.

C. Exclusion of Defendant's Offer to Pay \$225,000

The trial court excluded evidence of defendant's pre-trial offer to pay plaintiff \$225,000 out of the \$2.5 million deposit as partial compensation for profits owed. Defendant states that the offer was the only potential factor in

mitigation he could cite apart from facts incident to the original fraud, and notes that its exclusion enabled plaintiff to argue that no payment had ever been made and defendant had not "taken one single step to do justice" over the course of 11 years. In these circumstances, defendant urges that the court's ruling under Evidence Code section 352 was a prejudicial abuse of discretion.

The court thought that defendant's offer was somewhat "illusory" because of possible claims against the deposit for unpaid taxes. Although the court's ruling occurred before commencement of trial, expressions of concern on this subject appear from beginning to end throughout the reporter's transcript. They stemmed from uncertainties about who had received interest on the money and whether any taxes on the interest were owed or paid. Defendant maintains that such concerns were themselves illusory because no tax liens were ever filed against the deposit, and the court authorized a withdrawal from the deposit to cover compensatory damages after the verdict was in. But the clerk of Court had evidently received notices from the taxing authorities, and county counsel was sufficiently concerned about them to file a motion for instructions during the course of trial. Concerns about unpaid taxes had not been dispelled when the court made its ruling on the offer, and they had not even been resolved by the time of the post-trial hearing when Augusta Maidani's counsel advised the court that the resolution "should go quickly."

In light of those concerns, the court could reasonably conclude that the probative value of the offer would be substantially outweighed by confusion and undue consumption of time in evaluating its merits. (See *Westside*

Community for Independent Living, Inc. v. Obledo (1983) 33 Cal.3d 348, 355 [no abuse of discretion where "reasonable basis for the action is shown"].) We also find defendant's claim of prejudice unpersuasive. The court stated that it would have permitted evidence of cash tendered outside the deposit and, as noted in the new trial ruling, defendant could have borrowed against the \$1 million dowry but chose not to do so. It appears to us, as it appeared to the trial court, that the offer was "too little, too late."

D. Admission of Bankruptcy Court's Finding

Plaintiff was allowed to introduce, over objection, a finding of the bankruptcy court in connection with its dismissal of the bankruptcy petition filed by Hasso between the first and second trials. The finding was that the declaration Hasso submitted to stay execution in this case contained "various misstatements of fact with respect to the properties owned by the debtor, and the equity available for the Judgment Creditor Duggan." Defendant asserts that this evidence was only relevant to defendant's credibility and contends that admission of this finding was erroneous under Evidence Code section 878. Evidence Code section 787 provides that evidence of specific instances of conduct other than prior felony convictions that are "relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness."

The argument is made for the first time on appeal. The motion in limine to exclude this evidence cited Evidence Code section 352, and sections 402 and 403 relating to proof of preliminary and foundational facts. When the

matter was argued at trial, defense counsel again referred solely to Evidence Code section 352. Evidence Code section 353 provides that a judgment may not be reversed because of erroneous admission of evidence unless a timely objection is made, and "the admitted evidence should have been excluded on the ground stated." Defendant makes no attempt to justify exclusion of the bankruptcy court's finding on any of the grounds offered by his trial counsel. Accordingly, any error associated with admission of this evidence has effectively been waived.

We note in any event, however, that "evidence contradicting the testimony of a witness, even if it consists of proof of other wrongful acts, is proper if it is relevant to an issue in the case." (*People v. Clark* (1965) 63 Cal.2d 503, 505, fn. omitted; *People v. Knox* (1979) 95 Cal.App.3d 420, 434.) The misstatement in Hasso's declaration was failure to disclose a lien in favor of Hebe Hasso and, as the trial court noted in connection with its ruling, one of the issues in the case was Hasso's apparent use of interspousal transfers to try to defeat plaintiff's claim. We are therefore not persuaded that the bankruptcy court finding should have been excluded under Evidence Code section 787.

E. Excessive Punitive Damages

Defendant advances a number of arguments in support of the claim that the \$2 million punitive damage award is excessive as a matter of law. Before turning to these arguments, we note that we may not reverse the award unless the record as a whole, viewed most favorably to the judgment, indicates that it was the result of

passion and prejudice. (*Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 927.)

(1) Defendant's Demeanor at Trial

Defendant contends that the award must be reversed because the jury would have been improperly influenced by his trial demeanor. Noting that defendant is an Iraqi who sometimes had difficulty expressing himself because he is not a native English speaker, and that he tended to be argumentative, his counsel speculates that the award may well have been the product of jury antipathy. Such considerations may lead to a finding of passion and prejudice in an appropriate case. (See, e.g., *Goshgarian v. George* (1984) 161 Cal.App.3d 1214, 1230.)

On appeal, we must be mindful of the fact that the trial court had an opportunity to observe defendant's demeanor over the course of two trials, and it found that the evidence justified a \$2 million award. The principle that a new trial ruling on a punitive damage award is entitled to significant weight (see *Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 937), is especially important here, where we are called upon to assess the impression created by a witness we cannot observe. After a thorough review of the record, we conclude that to the extent the award was based on defendant's testimony, it resulted from what he said and not how he said it. Accordingly, we reject the argument based on defendant's trial demeanor.

(2) The Size of the Award

Defendant next contends that the award must be reversed because, in absolute terms, it "substantially

exceeds all other known awards against individuals that have been upheld." In this regard, defendant cites *Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 868, where, in the course of reversing what it termed a "colossal" punitive damage award of \$2,660,000 against an individual, the court remarked it was "aware of no case where even a six, let alone seven figure punitive damage award against a private individual has been upheld, regardless of the reprehensibility of the conduct." (Ibid.) We interpret this language as a commentary on existing precedents, rather than expression of a rule that seven figure punitive damage awards against individuals are per se excessive.

But our own brief survey has in any event revealed that seven figure punitive damage awards against individuals are not unprecedented in California and, contrary to defendant's assertion, the award in this case is not the largest ever reported against an individual in this state. A \$2 million punitive damage award against an individual for fraud in connection with a real estate transaction was upheld in *Ballou v. Master Properties No. 6* (1987) 189 Cal.App.3d 65, 75, where, although compensatory damages were only \$138,000, the court concluded that "the award of punitive damages is not so disproportionate as to shock the conscience or to indicate that it was the result of passion and prejudice." (See also *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623 [affirming \$1.5 million punitive damage award].)

Accordingly, we decline to rule that the award was excessive regardless of the reprehensibility of defendant's conduct.

(3) Excessiveness in Relation to Reprehensibility

Reprehensibility of the defendant's conduct is one of the factors to be considered in assessing punitive damages. (*Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d at p. 928.) Defendant argues that the only reprehensible conduct in this case was his fraudulent promise to pay plaintiff a portion of the profits from their original enterprise, and that the award greatly exceeds an amount appropriate to punish and deter that conduct. Appellant distinguishes cases like *Moore v. American United Life Ins. Co.*, (1984) 150 Cal.App.3d 610, where substantial punitive damage awards have been justified by a pattern of unethical conduct, by seeking to confine the fraud to a "single transaction."

This argument overlooks all of the evidence outlined in section I(C), *supra*, from which the jury could infer that defendant had engaged in a pattern of fraudulent conduct since the first trial by transferring and lying about his assets so as to avoid liability. Defendant contends that this court "mandated" a retrial relating to "the conduct affirmed in the original appeal as fraudulent," but we did not grant defendant a license to misrepresent his net worth. The reply brief also notes that "even if misstatements were made by defendant at any point during the course of this lengthy litigation, respondent cites no authority for the proposition that those misstatements could support a larger award of punitive damages." Such conduct, however, falls within one or more statutory definitions of "deceit" (see Civ. Code, § 1710, subds. (1) [intentional misrepresentation], (2) [negligent misrepresentation], and (3) [concealment]), and there is no reason why deceit during the course of litigation should be

treated differently for purposes of punitive damages than any other form of fraud.

In light of the pattern of fraudulent conduct, we are unable to conclude that the award was excessive in relation to reprehensibility.

(4) Excessiveness in Relation to Net Worth

Defendant also asserts that the award represents an excessive share of his net worth. A defendant's wealth is an important consideration in assessing punitive damages (*Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc.*, (1984) 155 Cal.App.3d 381, 390), and an award is presumptively the result of passion and prejudice if it represents a disproportionate share of the defendant's net worth (see *Little v. Stuyvesant Life Ins. Co.*, *supra*, 67 Cal.App.3d at p. 469). In this case, plaintiff maintains that the evidence would support a finding of net worth in excess of \$20 million. Defendant responds that much of this evidence amounts to sheer speculation, that the \$20 million figure improperly includes community property of Hebe Hasso, and that a new worth of no more than \$4-5 million was established. We are thus called upon to review the evidence of defendant's wealth, and we must determine whether the community property of his ex-spouse is appropriately viewed as part of his net worth for purposes of punitive damages.

In *People ex rel. Department of Transportation v. Grocers Wholesale Company* (Sept. 29, 1989, A041658) __ Cal.App.3d __, we held that a plaintiff seeking punitive damages bears the burden of proof on the issue of the defendant's wealth. On the other hand, it is well-established that the prevailing party is entitled on appeal to the benefit of

every reasonable inference from the evidence. (See, e.g., *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429). In light of these principles, we find that the record supports an inference of wealth in excess of \$12 million.

This figure includes: \$2.5 million in profits from the parties' real estate ventures; the \$2.5 million deposit to stay execution; the \$2 million property in Lebanon allocated to Hasso in his settlement agreement with Hebe Hasso; \$1.8 million received from Kodak in the 1970's (payments of \$3.5 million less \$1.7 million spent to purchase the properties involved in the lawsuit); \$1 million received from Gillette in the 1970's; the \$1 million dowry to Ruth Hasso; \$900,000 derived from the Bloomington transaction; and \$500,000 for antique furniture and persian rugs, for a total of \$12.2 million. We will assume, for purposes of this appeal, that the evidence does not support the additional wealth of approximately \$12 million claimed by plaintiff, consisting of: \$4.8 million for the presumed "time value of money"; \$4 million of property in Iran; \$2 million of community property of Hebe Hasso in Lebanon; and an additional \$1.1 million from the Bloomington transaction.

A portion of the \$12 million represents community property of Hebe Hasso. Defendant argues that the jury should have been instructed to disregard all of such property because it makes no sense to punish and deter on the basis of wealth that is no longer owned. Whatever its merits in the abstract, the argument was properly rejected in this case, where the community benefitted from the fraud, a final division of marital property had not yet occurred, the property settlement was still in dispute, and there was evidence suggesting that the tentative allocation of community property was designed to

prevent plaintiff from collecting on the judgment. In these circumstances, the court was unwilling to rule as a matter of law that Hebe Hasso's community property could not be considered on the issue of net worth. The instructions were limited to general statements about community property liability and spousal reimbursement rights so that both sides could argue whether the "assets that appeared to have been conveyed to Hebe Hasso have genuinely been conveyed and are no longer within the reach of John Hasso for calculating his wealth." In closing argument, defense counsel urged the jury to find that "those assets are not going to be available to John Hasso." The issue was appropriately treated as one of fact.

The question, then, is whether the \$2 million award, representing less than one-sixth of the defendant's net worth, must be viewed as excessive. In *Grocers Wholesale, supra*, we cited a survey of punitive damage awards appended to *Devlin, supra*, 155 Cal.App.3d at pp. 393-396, suggesting that such awards are generally not allowed to exceed 10 percent of net worth, and we determined that the conduct in *Grocers Wholesale* did not justify imposition of an award in excess of that percentage. But each case must be decided on its own facts and this case, unlike *Grocers Wholesale*, does not involve a single misrepresentation. The jury implicitly determined, and the court expressly found, that the evidence revealed a pattern of continuing misrepresentation designed to defeat plaintiff's claim. The award, moreover, is less than the profit generated by the original fraud. (See Civ. Code, § 3295, subd. (a)(1) [profits from wrongful conduct relevant to assessment of punitive damages]; and *Wyatt v. Union Mortgage Co.*, (1979) 24 Cal.3d 733, 791 [upholding award that was "less than the income directly generated by

appellants' wrongful conduct"].) We conclude in light of these considerations that the reduced award is not excessive in relation to defendant's net worth.

F. Jury Instruction on Burden of Proof of Net Worth

A final issue has arisen after the close of briefing by virtue of our decision in *Grocers Wholesale*. In that case, we noted the conflict between *Vossler v. Richards Manufacturing Co.* (1983) 143 Cal.App.3d 952, 961-965 [defendant bears burden of producing evidence of its wealth for purposes of punitive damages]), and the recent decision in *Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1267-1269 [plaintiff bears burden of proof on issue of defendant's net worth], and we determined that *Dumas* sets forth the better rule. Accordingly, we remanded for a new trial on punitive damages against a defendant in *Grocers Wholesale* because no evidence of its net worth had been presented.

A substantial amount of evidence was presented with respect to defendant's net worth in this case, but the jury was instructed on the basis of *Vossler* that the "defendant has the burden of proof of establishing all of the facts necessary to establish his inability to pay a given amount of punitive damages." We find that this instruction was erroneous for the reasons stated in *Dumas* and *Grocers Wholesale*. Defendant, however, did not object to it, and "[t]he failure to object to an instruction relieves an appellate court of the obligation to review claimed error therein. [Citation.]" (*Wilkinson v. Bay Shore Lumber Co.* (1986) 182 Cal.App.3d 594, 599.)

Assuming *arguendo* that the point had not been waived, the remaining question would be whether this

error was prejudicial. "A judgment may not be set aside on the ground the jury was misdirected unless a reviewing court, after an examination of the entire cause, including the evidence, shall be of the opinion that the error resulted in a miscarriage of justice." (*Wilkinson, supra*, at p. 599.) It must appear "'probable that the jury's verdict may have been based on the erroneous instruction . . .'" [Citations.]" (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 875.)

The error in this case was exacerbated by plaintiff's counsel's comments on the burden of proof during closing argument. But another factor to be considered in weighing the effect of an erroneous instruction is the "closeness of the jury's verdict" (*LeMons, supra*, 21 Cal.3d at p. 876), and it is clear from the very brief deliberation leading to the unanimous verdict that this was not at all a close case in the jury's mind. Looking back at the trial as a whole, we do not believe that the single erroneous instruction turned this lengthy and otherwise error-free proceeding into a "miscarriage of justice," and it does not appear "probable" to us that a different verdict would have resulted from a different instruction. We thus would not be inclined to rule that the instruction was prejudicial even if the error had not been waived.

III. DISPOSITION

The judgment and the conditional order granting a new trial are affirmed. The parties shall bear their own costs on appeal.

-C1-

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION: 4

DUGGAN, CHARLES A.
vs.
HASSO, JOHN, ET AL.
A042843 Old No. A019074
Napa County No. 39856

FILED
DEC 28 1989

BY THE COURT:

The petition for rehearing is denied.

Dated: DEC 28 1989

/s/ Anderson P.J.

-D1-

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division Four,
No. A042843
S013644

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

FILED
FEB 14 1990

CHARLES A. DUGGAN, Respondent

v.

JOHN HASSO Et Al., Appellants

Appellants' petition for review DENIED.

LUCAS
Chief Justice

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR

CHARLES A. DUGGAN

v.

JOHN HASSO et al.

A042843

Napa County

Sup. Ct. No. 39856

BY THE COURT:

The motion of appellants John Hasso et al. for stay of issuance of the remittitur is granted. It is hereby ordered that issuance and transmission of the remittitur be stayed to and including May 15, 1990, and if on or before that date appellants file a petition for writ of certiorari in the United States Supreme Court, then the remittitur of this court shall be stayed until after the U.S. Supreme Court has passed upon that petition.

Dated: MAR 23 1990

ANDERSON, P.J. P.J.

-F1-

No. S013644

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

CHARLES A. DUGGAN, Respondent

v.

JOHN HASSO et al., Appellants

FILED
APR 10 1990

Petition for review and request for stay denied.

LUCAS
Chief Justice
